18 October 2024

Joint Listing Authority Advisory Panel (LAAP) and Markets Practitioner Panel (MPP) Response to CP24/12

The FCA's LAAP and MPP are pleased to submit a joint response to the FCA's CP24/12 Consultation on the new Public Offers and Admissions to Trading Regulations regime (POATRs)

LAAP is an independent statutory panel that advises the FCA on policy issues which affect issuers of securities, and on policy and regulation proposals from the FCA listings function. Similarly, MPP is an independent statutory panel. It advises the FCA on policy issues, regulatory proposals and other strategic matters that are likely to affect wholesale financial markets. The FCA is required to establish and maintain these Panels under FSMA. The FCA Board appoints Panel Members and not as representatives of any individual firm; they are expected to contribute to the respective Panels from the perspective of wholesale and securities markets or the primary market sub-sector in which they are working, drawing on their personal experience and industry sentiment more generally.

LAAP and MPP would like to open by saying they welcome this opportunity to improve the efficiency of further capital raisings by listed companies. This complements the ground-breaking reforms of the UK Listing Regime which came into effect in July 2024. We firmly believe these reforms will help to further enhance the attractiveness and competitiveness of London's offering as a listing venue and international financial centre without losing any of its long-standing reputation for high regulatory standards. Together with other reforms, this has, and will continue to, focus attention across all stakeholders in the evolution of the UK Capital Markets. As the FCA has well noted, there are a series of elements that drive the operation of UK Capital Markets of which regulation is an important element, but not the only piece.

This joint response reflects views widely held by LAAP and MPP Members and does not necessarily imply unanimity. We have provided feedback on a number of core areas and grouped our response under the relevant topic. Many of the proposals under consultation are highly technical and we have cross referred to the detailed responses by Trade Associations which some members have been engaging with.

We would be happy to discuss any points within this response once the FCA has considered stakeholder feedback to the consultation.

Requirement for a prospectus if issuing 75 per cent or more of issuer's issued share capital in a 12-month period

While there is broad consensus for a higher threshold, it should be noted that LAAP and MPP could not reach a unanimous view on the threshold. Some members supported the proposal of 75% as recommended in the 2022 Secondary Capital Raising Review (SCRR) [1]. Others felt that this was too high and expressed support for lower levels. The fact that there are a range of views on the threshold is a key part of balancing the attractiveness of UK Capital Markets as a destination to raise capital easily (particularly to encourage growth for companies listed in London), and protecting the rights of new, and particularly in relation to equity shareholders, existing security holders.

[1] UK Secondary Capital Market Raising Review

Thresholds vary across jurisdictions and an ambitious approach offers the opportunity for UK capital markets to be more competitive, in line with UK regulators' competitiveness objective. The EU Listing Act has a 30% threshold (and the simplified prospectus regime). The US has no requirements for a document or pre-emption. For US offerings, there are likely to be other considerations in relation to the threshold that a documented offering will want to be made by the market.

The practical impacts and potential market behaviour are important, and some issuers may decide to issue voluntary prospectuses to provide investors with more information. Therefore, if the threshold set by the FCA were higher than where some market participants were entirely comfortable with, new market practice would evolve, which to an extent reflects the FCA's approach to regulation being only part of the decision-making process for market participants. Equity raising for larger companies often includes a capital raising in the US and as such those companies, their advisers and investors will consider US securities law – but will be able to do so against the backdrop of the additional flexibility that a materially higher threshold than 20% will afford them under the pure regulatory regime and so allowing market practice to develop but without regulatory constraints.

One additional point to bear in mind is that in a rescue financing situation, time is usually of the essence for the issuer involved, often at an existential level – there are plenty of examples of this. As such, the ability to come to market as quickly as possible to raise the funds required should be prioritised, which is likely to inform where the percentage threshold for a further issuance in these circumstances should be set – e.g., at the same (heightened) level as for secondary prospectuses generally.

The existence of pre-emption in the UK and the Pre-Emption Group means that for capital raising over 20%, a circular would be required, and shareholder approval sought therefore providing the market with greater information. There are not the same pre-emption requirements for shareholder approval in other jurisdictions particularly the US and there is a cost, both economically and in terms of effort, with regard to imposing additional prospectus requirements. The prospectus requirements should also be considered alongside that.

The impact of a voluntary prospectus on the likelihood of retail participation should also be considered. To avoid such a document having to be approved as a financial promotion by an authorised person, consideration should be given to the current construct of the Financial Promotion Order, or framing the new regime so that issuers could offer shares to retail investors in these circumstances in reliance on Article 68 of the FPO.

Working Capital Statement

We are generally supportive of the FCA proposals in relation to moving away from a binary working capital statement and allowing assumptions similar to the approach taken during the Covid pandemic. However, issuers and other stakeholders are likely to require clear guidance from the FCA as to the nature and type of acceptable assumptions that can be made (so as not to caveat away the entire validity of the statement itself).

The guidance provided from the Financial Reporting Council (FRC) in 2020 provided greater alignment with going concern and working capital although the exercises remain slightly different. The working capital exercise can be perceived as something very technical, so potentially some education is required to ensure all market stakeholders understand the purpose of the statement. The UK interpretation and typical work done for an equity transaction (where it is different to other markets and potentially requires a further expert opinion, i.e., reporting accountants) should be highlighted as part of the introduction of the new prospectus rules. The more a revised approach can dovetail/benefit from existing

going concern and viability work the better to simplify the approach and work needed by issuers.

The FCA should note that the Institute of Chartered Accountants in England and Wales (ICAEW) guidance for preparers of PFI and the SIRS may also need to be amended to reflect any amendments to working capital disclosures in the prospectus as these are currently tailored to the old class 1 circular regime and the EU prospectus regulation

Complex Financial History

We suggest this area would benefit from more detailed guidance.

Within the context of a disclosure-based regime, considering the complex financial history rules will ensure that investors have sufficient information to make investment decisions. Balancing that to ensure proportionate requirements for issuers is important. Ensuring that the appropriate metrics are used to test the relative size of acquisitions or disposals and that those parameters are clear for both issuers and the wider market is also critical. As with the changes to the Listing Rules, there will be a period of time during which market dialogue develops within a more disclosure-based regime.

This is a highly complex area where either some simplification or very clear guidance is necessary to ensure that the risk is reduced of existing and potential issuers receiving differing professional advice that may wrongly inform an important decision on listing location. We would welcome the opportunity to discuss this with the FCA. As a general point, we would encourage the FCA to ensure that the benefits of the listing regime amendments for companies with a complex financial history are mirrored in the disclosure regime.

It is especially important for guidance to be published to ensure that there is no onerous requirement for those using the international segment, where equity is already listed overseas. The complex financial history guidance should allow for differences in accounting policies used and for incorporation of already published information rather than requiring restatements to bring policies in line for the full period. The FCA may also drop any requirement for the first year of the track record for large acquisitions acquired during that time (versus those significant acquisitions that are the subject of the prospectus).

Rescue Financing: Requirement for issuers to notify the FCA if further issuance relates to rescue financing

Based on the proposed drafting, this is an area where we recommend further guidance on what might constitute a rescue refinancing.

For example, where a company needs to repay proceeds of debt facilities using funds raised through equity and whether there is a threshold to determine that similar to the debate on the threshold for prospectus issuance. It may be appropriate to align the thresholds, particularly if the threshold is 50-66% or above and in the absence of an acquisition or other defined use of proceeds for growth (sometimes equity or other financing is raised for future acquisitions for example) where the definition of refinancing is clear because of the risk.

The proposal on the requirement for issuers to notify on a rescue financing is noted. Historically the requirement to consider a reconstruction or refinancing and appoint a sponsor sat within the Listing Rules and the sponsor and other advisers were a part of forming the decision on ‘rescue’ financings.

Publish Retail offer prospectuses 3 working days before admission

The Panels are supportive of wider access to securities. Technological advances mean that retail investors and institutional investors have access to relevant documents in an electronically distributed format - e.g., prospectuses - at the same time. Although this rule is aimed at ensuring retail investors are given more time to contemplate an offer, in practice, issuers may be inclined to exclude retail investors from IPOs as a mandatory minimum offer period introduces execution risk to an IPO (whether perceived or real). We support the reduction of the six-day rule, with some members going further and suggesting no minimum time period.

However, retail debt is a topic that should be discussed separately and, in both equity, and debt, ensuring that retail investors are aware that they should read prospectuses remains important.

Requirements for admission to trading of non-equity securities

In general, in relation to non-equity securities the view of market participants (and relevant Panel members) is that the new proposed regime in CP24/12 is broadly consistent with the current prospectus regime, with some helpful improvements. For example, voluntary forward incorporation by reference and more flexibility in relation to supplements to base prospectuses.

There are some areas where either further clarity is needed in relation to proposed changes, or the changes do not seem to improve the current position, or where adjustments could be made to the proposals to make them more useful. Key points include the need to: provide clarification in relation to the withdrawal rights for supplements on the regulated market and MTFs; adjust conditions relating to supplement flexibility; and clarify the relationship between forward incorporation by reference of financial information and the trigger for supplements and other disclosure in base prospectuses.

We refer to the response to CP24/12 submitted by the International Capital Market Association (ICMA) for detailed comments on the above, and other, technical points in the context of vanilla debt securities. Note that there may be a need to re-visit some of the proposals in CP24/12, for example the content of the disclosure annexes, when the FCA publishes its planned separate consultation on low denomination retail bonds.

Sustainability disclosures

In relation to debt securities, we refer to the ICMA response for comments on the application of the proposed climate disclosure rule, and on the voluntary additional disclosures relating to Use of Proceeds (UoP) Bonds and Sustainability Linked Bonds (SLBs), which will need to be re-worked if they are to achieve their desired purpose in a way which is compatible with market practice.

Protected Forward Looking Statements (PFLS)

The Panels are supportive in principle of the proposed revised regime and appreciate the thought that the FCA have put into the PFLS to try and unlock the potential for disclosure of forward-looking information - particularly for high growth companies and their investors but also more widely. This is clearly an area that requires thought on alignment with other securities regulations, otherwise a change in the UK rules might not make a difference for companies who issue securities internationally.

Similar to other areas of the consultation we consider this would benefit from more granular guidance as to how this would work. The proposal as it stands is potentially

difficult to execute in practice where an international offering is contemplated, but that is not a reason not to have the regulatory flexibility in the UK.

Primary MTFs

We have a number of concerns with the proposals.

Under the current approach, MTF operators are able to decide whether an admission document is required in respect of securities already admitted to the market remains appropriate. This flexibility has been key to the competitiveness of growth markets. Requiring only one type of admission document for all new admissions to trading on Primary MTFs will significantly reduce the ability for MTF operators to tailor disclosure requirements to the needs of the users of the market and will put issuers at a material disadvantage to their private peers. We set out specific recommendations below.

Protected Forward-Looking Statements The FCA states that for Primary MTFs, they are unable to use target exclusions from the contract requirements for an MTF admission prospectus, as the market operators (i.e. AIM and Aquis) will set the content requirements.

We recommend that MTF operators can propose exclusions for protected forward-looking statements to the FCA as part of its review of an operator's rules so that MTF Prospectus can fully benefit from the PFLS regime.

Discretion for Primary MTFs We maintain that Primary MTFs should have discretion over the need for an MTF prospectus outside of an IPO, particularly for micro-cap issuers. This discretion would help assess whether a public offer is in the best interest of the market and consumers, based on factors such as size, operating history, and risk.

Additional points

The following points have been raised by members for the FCA's consideration. These were not specifically consulted on, but we believe them to be relevant to the overarching objectives of the policy reform.

Encouraging retail investment

Paragraph 1.3 of CP24/12 states that the proposals "aim to reduce the costs of listing on UK markets, make capital raising easier on UK listed markets and remove barriers to retail participation".

We are in favour of rules which would open up both IPOs and secondary issuances to retail investors which, would assist in invigorating the UK capital markets given that retail investors have c.£1 trillion available to invest.

As noted by New Financial, the number of households who directly own shares in the UK have more than halved in the last 20 years from 23% to around 11%[2]. These reforms are an opportunity for UK retail investors to become more active participants in UK capital markets, whilst noting, as Nikhil Rathi has said, that this involves a change in risk appetite and that "the assumption has to be that retail investors take a portfolio approach to investing and do so in the knowledge that they may lose as well as profit from their investments."[3]

[2] Widening retail participation in equity markets - New Financial (usrfiles.com)
[3] Reforming our capital markets ecosystem | FCA

The Capital Markets Industry Taskforce Report "The Capital Markets of Tomorrow" sets out in detail on pages 20 to 21 several issues with current share ownership by retail in the UK.[4] It recommends implementation of measures to encourage more retail investment including in UK companies and that the FCA should focus on broadening retail access in a meaningful way when considering the prospectus reforms. By way of example of measures that aim to enable retail investor access we note the regime in Hong Kong where there is a mandatory retail/public offering requirement of at least 10 per cent of the total offer size for all Hong Kong IPOs. The Hong Kong regime is designed to ensure a fair and equitable distribution of shares among different types of investors, balancing the interests of both public/retail and institutional investors and a similar regime could also work in the UK.

COBS rules regarding unconnected analysts

In addition, whilst not directly related to the new prospectus rules, we would like to raise the prospect of reviewing COBS 11A and 12.2.21A. The market's view on these rules was set out in Lord Hill's Listing Review in March 2021. Rachel Kent's Investment Research Review report published in July 2023 also recommended that these rules be reviewed (recommendation 7). Whether COBS 11A or COBS 12.2.21A have been beneficial to investors is highly questionable.

With respect to COBS 12.2.21A, banks already have in place conflict of interest policies and procedures that govern communications between research analysts and issuers, which banks will apply when analysts engage with companies. COBS 12.2.21A creates uncertainty and has led to fewer conversations between research analysts and potential IPO candidates for fear of ruling the bank out of a role as bookrunner on an IPO. Whilst it is helpful to protect research analysts to have in place clear rules that discourage companies from putting undue pressure on an analyst, the current rules are too rigid and need to be reconsidered.

With respect to COBS 11A, the rules to provide unconnected analysts with the same information as connected analysts in order to write pre-IPO research have not resulted in any perceptible change to the amount of unconnected research. In addition, they present companies with significant extra costs (eg, having to prepare a Registration Document) as well as increasing execution risk for issuers using the UK markets by lengthening the public phase of the IPO timetable by 7 days, which is seen as a competitive disadvantage and friction point. Due to the difficulties in ensuring parity of information between connected and unconnected analysts, the rules have resulted in a complete shutdown of communication between analysts and IPO issuers ahead of the analyst presentation which is not in the best interests of issuers. Such interactions should be permitted subject to banks' policies and procedures regarding conflicts of interest (as is the case for IPOs on other markets such as AIM and Aquis).

[4] Capital-Markets-Of-Tomorrow-report.pdf (capitalmarketsindustrytaskforce.com)